

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

RUSSELL STEPHEN PATRICK

Defendant

- and -

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Interveners

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PART I—OVERVIEW AND THE FACTS

1. In this case, the Court must determine whether the state may use a mandatory regulatory process to put the activities we undertake in our homes under warrantless surveillance. The Calgary police were investigating the appellant but did not have enough evidence to obtain a warrant. The City of Calgary’s waste management bylaw required the appellant to deposit his household trash for collection by municipal authorities. That bylaw prohibits anyone from “scavenging” the contents of waste containers and prohibits anyone other than designated city personnel from collecting the waste. Nevertheless, the police trespassed on his property, seized the contents of his waste containers and scavenged through them looking for evidence.
2. The section 8 issue in this case must be framed in broad and neutral terms: whether, in a society such as ours, persons who consign their waste to public authorities for management, reasonably expect the criminal justice apparatus of government to commandeer that process in order to examine our household activities.
3. The Canadian Civil Liberties Association (CCLA) accepts and relies upon the facts as set out in the factum of the Appellant. The following facts are also important. One, the police were engaged in routine crime investigation. There were no exigent circumstances such as the preservation of evidence or the interception of a threat to public safety and order.
4. Two, the contents of the appellant’s waste container and the information that could be derived from those contents were not, in any constitutional sense, “abandoned” to all people for all purposes.
5. The bags were at all times deposited in cans and “set out” to be “collected” by a City “collector” as required by the City of Calgary’s Bylaw to Regulate and Manage Waste. This bylaw, “regulate[s] and control[s] the storage, collection and disposal of waste” and imposes specific rules, including the permissible content of bags and containers, and the times and locations for “collection” by designated personnel.¹ The bylaw states that “no person shall

¹ City of Calgary, Bylaw No. 20M2001, *Waste Bylaw* (6 October 2003), ss. 7, 17, 19.

scavenge waste from a commercial bin, waste container or plastic bag”² and “no person shall scavenge at a City disposal site”³.

6. Three, the police seized and searched the contents of the appellant’s garbage bags six times, trespassing on his property and violating the bylaw.⁴ They never had a warrant and knew they did not have enough evidence to get one.⁵

7. Four, this was not an isolated incident. Rather, it is an accepted practice of Calgary police to seize citizens waste containers and even pose as garbage collectors for the purpose of scavenging waste to harvest evidence for use in the investigation of crime.⁶

PART II—ISSUES

8. The CCLA respectfully submits that the following issues arise: 1) did the police conduct violate s. 8 of the *Charter*?; and 2) ought the evidence to have been excluded pursuant to s. 24(2) of the *Charter*?

PART III—ARGUMENTS

ISSUE 1: THE POLICE CONDUCT VIOLATED S. 8 OF THE CHARTER

A. THERE IS A REASONABLE EXPECTATION OF PRIVACY IN HOUSEHOLD WASTE

9. The spirit of section 8 must not be constrained by narrow, legalistic classifications.⁷ Whether a reasonable expectation of privacy exists must be framed in broad and neutral terms⁸ and answered on the totality of the circumstances,⁹ not on an ex post facto assessment of illegal activities. Courts must consider the location of the search, the target of the search, and the relationship between the individual asserting the privacy right and what is being searched. Consideration must also be given to the existence of a subjective expectation of privacy in the target of the search and whether that expectation was reasonable.¹⁰

² *Ibid.* at s. 4.

³ *Ibid.* at s. 39(c).

⁴ *R. v. Patrick*, [2007] ABCA 308 at para. 2.

⁵ Testimony of Constable Ryan J. Smart, Appellant’s Appeal Book at Tab 4D.

⁶ Testimony of Constable Peter Hearty, Appellant’s Appeal Book at Tab 4C.

⁷ *R. v. Dymont*, [1988] 2 S.C.R. 417 at p. 426.

⁸ *R. v. Wong*, [1990] 3 S.C.R. 36 at p. 50.

⁹ *R. v. Mohamad*, [2004] 69 O.R. (3d) 41 at para. 23; *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 31; *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 31.

¹⁰ *Tessling*, *supra* note 9 at para. 32; *Edwards*, *supra* note 9 at para. 45.

10. The majority in the Alberta Court of Appeal did not frame the constitutional question in broad and neutral terms. It asked whether the appellant could have an expectation of privacy in property he intended to discard. This question rests on the incorrect assumption that compliance with a mandatory municipal process entails complete abandonment of all information for all purposes to all people and particularly to law enforcement for crime investigation. An expectation of privacy can be diminished incidental to a regulatory or other government objective but that does not mean it is extinguished. Partial disclosure of the contents of our waste incidental to its handling and management or the risk of mischievous intervention by “scavengers” may diminish, but does not extinguish, a legitimate expectation of privacy particularly where police powers to investigate our household activities and obtain intensely private information is concerned.

i) The Subject of the Seizure and Search

11. As stated by Bedard, J.C.Q. in *R. v. Andrews*, “[l]e sac à déchets est immanquablement révélateur en ce que son contenu peut-être et est à la fois anodin, privé et intime”.¹¹ Similarly, Justice Brennan, dissenting in *California v. Greenwood* correctly observed that:

A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the “intimate activity associated with the ‘sanctity of a man's home and the privacies of life.’”¹²

12. The application of s. 8 to the police conduct at issue must be guided by the recognition that examination of household waste affords a revealing portal into our homes, our bodies and our relationships. In a very real sense, police scrutiny of our household waste is the functional equivalent of being inside the home.¹³ The search of a single bag will yield DNA, fingerprint,

¹¹ *R. v. Andrews*, [2005] J.Q. no 8595 (C.Q.) (Q.L.) at para 44 (<translation> “the garbage bag is undeniably revealing in that its contents can at times be anodyne, private, and intimate”).

¹² *California v. Greenwood*, 108 S. Ct. 1625 at p. 1634 (1988).

¹³ In *Tessling*, *supra* note 9 at para. 58, the Court found that because of the nature and quality of the information obtained, the police were not considered to be “inside” the home. It is submitted that the nature and quality of the information found in household waste places police inside the home.

medical, financial, cultural, political and religious information about the occupants of a house – a yield frequently beyond the reach of a lawfully executed search warrant.

13. There is a constitutional presumption that information about what happens inside the home is regarded by occupants as private. “Such an expectation is rooted in the ancient law of trespass and finds its modern justification in the intimacies of personal and family life.”¹⁴

14. Historically, privacy was rooted in the concept of property and trespass. If the curtains were drawn the King’s agents could watch from a distance but could not see what was going on inside. However, “as the state’s technical capacity for peeking and snooping increased, the idea of a protective sphere of privacy was refined and developed.”¹⁵ The reality of life in a complex regulated society means that there are many more intersections between citizen and state which provide entry points for the King’s agents to peer through drawn curtains.

15. While the origins of search and seizure applied to property and to the home, s. 8 is not restricted to the protection of property or the law of trespass. Section 8 “extends a broad and general right to be secure from unreasonable search and seizure”.¹⁶ Thus, the protected interest is our personal privacy.

16. This seizure and search will lay bear the “most intimate and private activities”¹⁷ of life. Unlike the constitutionally meaningless heat pattern in *Tessling*, or the highly specific odour of drugs in *A.M.*, the contents of our household waste speak broadly and eloquently of the “intimate details of the life and personal choices of the individual”.¹⁸

ii) The Bags and the Information Inherent in their Contents Were Not Abandoned

17. The majority in the Court of Appeal reasoned that any presumption that the appellant’s waste would have included items that expose intimate details or core biographical data is “undermined by the reality that putting items in garbage bags and then leaving them for pick up in a publicly accessible receptacle amounts to an abandonment of those items, *and any*

¹⁴ *Ibid.* at para. 38.

¹⁵ *Ibid.* at para. 16.

¹⁶ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 158.

¹⁷ *Tessling*, *supra* note 9 at para. 22.

¹⁸ *Ibid.* at para. 25, citing *R. v. Plant*, [1993] 3 S.C.R. 281 at p. 293.

information that may derive from those items”.¹⁹ The majority also reasoned that constitutional privacy protection could never be extended to evidence of involvement in criminal activity.

18. In so doing, the majority placed the state’s ability to intercept and extract intimate details and core biographical data from household waste entirely outside constitutional regulation. This is inconsistent with our jurisprudence which recognizes that within the *Charter* the need for privacy and constitutional regulation of that need “can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion”.²⁰

19. As an analytical tool, abandonment is a narrow concept, rooted in personal property. It should be applied with caution in the context of s. 8 and the advanced surveillance technologies of the state. As the Ontario Court of Appeal stated, abandonment:

... occurs when there is “a giving up, a total desertion, and absolute relinquishment” of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property.²¹

20. Several U.S. State Supreme Courts support a finding of privacy in garbage.²² The Supreme Court of Hawaii in *State v. Tanaka*, stated that:

People reasonably believe that police will not indiscriminately rummage through their trash bags to discover personal effectsIf we were to hold otherwise, police could search everyone’s trash bags on their property without any reason and thereby learn of their activities, associations, and beliefs.²³

21. There is no reason to believe the appellant, in any constitutionally meaningful sense, abandoned the information inherent in his household waste. The regulatory framework required that he could not bury, burn or recycle it himself. The production and regulated disposal of household waste is the inevitable consequence of life in modern society. As noted by the Supreme Court of Washington in finding an expectation of privacy in household waste:

¹⁹ *Patrick*, *supra* note 4 at para. 36 (emphasis added).

²⁰ *R. v. A.M.*, [2008] SCC 19 at para. 55, citing *R. v. Colarusso*, [1994] 1 S.C.R. 20 at p. 53.

²¹ *Simpson v. Gowers* (1981), 32 O.R. (2d) 385 at p. 387, citing R.A. Brown, on The Law of Personal Property, 2nd ed. (1955) at p. 9.

²² See e.g. *State v. Galloway* 109 P.3d 383 (Or. 2005); *State v. Goss*, 834 A.2d 316 (N.H. 2003); *State v. Hemptele*, 576 A.2d 793 (N.J. 1990); *State v. Morris*, 60 A.2d 90 (Vt. 1996); *State v. Boland*, 800 P.2d 1112 (Wash. 1990).

²³ *State v. Tanaka* 701 P.2d 1274 at 1276-77 (Haw. 1985).

The proper and regulated collection of garbage...is as necessary to the proper functioning of modern society as is the telephone company. While a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion.²⁴

22. The appellant, as required by law, put his waste out for collection by designated authorities for a specific purpose. The evidence suggests that he exercised every option available to him to maintain control of his waste and comply with the bylaw as he was obliged to do. As in *Buhay*, he “sought to preserve as much privacy in [his belongings] as the circumstances...and activities permitted.”²⁵

23. In *Williams and Other v. Phillips*, the Divisional Court in England held that waste set out for collection was not abandoned. The Lord Chief Justice observed:

If I put refuse in my dustbin outside my house, I am not abandoning it in the sense that I am leaving it for anybody to take it away. I am putting it out so that it may be collected and taken away by the local authority and until it has been taken away by the local authority, it is my property. It is my property and I can take it back and prevent anybody else from taking it away.²⁶

24. Consigning household waste to municipal waste management does not entail an abandonment of those items, or the information that is intrinsic and non-erasable from them, to all persons for all purposes. Certainly, there is no abandonment of that information in any constitutionally voluntary sense.²⁷ In *R. v. Stillman*, police seized a DNA sample from a tissue discarded by the accused while in custody. This Court held that the accused had not abandoned his bodily fluids in any constitutional sense because the production of bodily samples is the inevitable consequence of the normal functioning of the human body. Under these circumstances, the Court concluded that “it is somewhat misleading to speak of ‘abandonment’”.²⁸

25. There is an important constitutional distinction between consigning a physical item such as an empty pill bottle, financial statement or sanitary napkin to the municipality for

²⁴ *State v. Boland*, 800 P. 2d 1112 at 1117 (Wash. 1990).

²⁵ *A.M.*, *supra* note 20 at para. 65, citing *R v. M. (M.R.)*, [1998] 3 S.C.R. 393.

²⁶ *Williams and Others v. Phillips Roberts and Others v. Phillips*, 1957 WL 18264 at *8 (DC Jan. 21, 1957).

²⁷ *Tessling*, *supra* note 9 at para. 48.

²⁸ *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 58.

waste management and abandoning the information which resides in that physical object to the law enforcement apparatus of the state.

26. As this court observed in *A.M.*, a reasonable expectation of privacy in the contents of a letter is not extinguished when possession is given up for the specific purpose of delivery. The same can be said of luggage consigned to transit authorities. The majority below rejected this line of analysis on the basis that luggage is expected to be returned. This is a distinction without a constitutional difference. We do not expect a letter or parcel to be returned but we reasonably consider its contents private even after it is mailed. And while waste is not expected to be returned it is expected to be anonymised and destroyed in accordance with the relevant bylaw, thereby preserving its inherently private aspects.

27. Some diminished expectation of privacy may be an inevitable aspect of the waste management process, but this does not equate to a complete loss of constitutional protection.²⁹ As noted in *A.M.* and *M.(M.R.)*, “the fact that school authorities may on occasion disregard this expectation of privacy does not make it disappear. ‘Expectation of privacy is a normative rather than a descriptive standard’”.³⁰ Similarly, in *R. v. Wong* this court refused to accept the proposition that:

...by courting observation by other persons in the room, [the accused] has effectively relinquished any right to maintain a reasonable expectation of *freedom from the much more intrusive invasion of privacy constituted by surreptitious video surveillance on the part of the state.*³¹

28. A diminished expectation of privacy in a hotel room, bus terminal locker, and even a jail cell does not vitiate constitutional recognition of an expectation of privacy.

29. The majority disregarded the appellant’s expectation of privacy in his garbage by speculating that “animals, bottle pickers and nosy neighbours ...might well inspect his garbage without Patrick knowing that it was going on.” With respect, this misses the constitutional issue. As Justice Brennan noted in dissent in *Greenwood*:

The mere *possibility* that unwelcome meddlers *might* open and rummage through containers does not negate the expectation of privacy in their contents

²⁹ *Tessling*, *supra* note 9 at para. 42.

³⁰ *A.M.*, *supra* note 20 at p at para. 65.

³¹ *Wong*, *supra* note 8 at p. 49 (emphasis added).

any more than the possibility of a burglary negates an expectation of privacy in the home.³²

30. The risk of some intrusion into otherwise private activity does not negate the legitimate expectation of privacy in that activity. Indeed, this Court rejected this analysis in *Wong*.³³ Similarly, Justice Binnie in *A.M.* noted that:

If an accused has a privacy interest in the contents of a letter, it is not lost when she takes it out of her purse and posts it. If an accused has documents concealed in the locked trunk of his car, the privacy interest in the contents of the trunk of the car does not depend on whether he is in the car or has left it parked...[in] a public parking lot.³⁴

31. The majority below erroneously tied an expectation of privacy to exclusive possession and the ability to regulate access. There are many instances in which a legitimate expectation of privacy exists alongside diminished control or possession – letters, luggage, automobiles, financial records, and medical records and information are examples. In this case, the Calgary Police commandeered and diverted the municipal waste management process for the purposes of investigation and surveillance. While we accept that waste disposal personnel may, incidental to the waste management process, see a slice of our personal life, we do not expect the waste management process to be a surveillance conduit; a mine of intimate information scavenged from articles of personal hygiene, fingerprints from soup cans, and lists of religious, political, and social affiliations and interests. In *Andrews*, Bedard J.C.Q. recognized that municipal waste disposal anonymizes refuse so that certain objects may be destroyed in a private manner.³⁵

32. Contrary to the majority’s reasoning at paragraph 34, the appellant’s expectation of privacy is no less diminished because he was engaged in illicit activity. This Court has long held that the right to privacy cannot be addressed in that narrow context and recently stated that it has “accepted a legitimate privacy interest in a home despite the presence therein of a drug ..., as well as the privacy of an office despite the existence of incriminating documents ... and an automobile despite the discovery of incriminating evidence....”³⁶

³² *Greenwood*, *supra* note 12 at p. 1636.

³³ *Wong*, *supra* note 8 at p. 45, citing *R. v. Duarte*, [1990] 1 S.C.R. 30 at p. 48.

³⁴ *A.M.*, *supra* note 20 at para. 48.

³⁵ *Andrews*, *supra* note 11 at para. 53.

³⁶ *A.M.*, *supra* note 20 at para. 73.

33. It is a long constitutional leap from depositing waste with the city for “storage, collection and disposal” to abandonment of our intimate information to the surveillance and investigative apparatus of the criminal justice system. This is a leap the *Canadian Charter of Rights and Freedoms* does not permit.

B. AN EXPECTATION OF PRIVACY IN HOUSEHOLD WASTE IS OBJECTIVELY REASONABLE

34. From Vancouver to St. John’s, Canadian society tightly regulates solid waste management. City bylaws, including the City of Calgary’s, prohibit “picking over”, “interfering with” or “scavenging” garbage, thereby contemplating that household waste will be collected and placed anonymously in a landfill.³⁷ Section 4 of the City of Calgary bylaw states that “[n]o person shall scavenge waste from a commercial bin, waste container or plastic garbage bag.”³⁸

35. This regime reflects our expectation of privacy in our household waste and the “type of society which Canadians, by their adoption of the *Charter*, have elected to live in.”³⁹ We would find it abhorrent to encounter our neighbours on “garbage day” sifting through our waste containers in search of personal information.

36. We reasonably expect our household waste to be left alone by the state except by those entrusted with the task of collecting and dealing with it in accordance with our waste management regime. Ours is not a society with open garbage dumps, scavenged and picked over. We rightfully view “garbage day” as a collective effort to manage our solid waste for

³⁷ City of Calgary, By-law No. 20M2001, *Waste Bylaw* (6 October 2003), ss. 4, 7, 17, 19; City of Toronto, By-law Chpt 844 *Waste Collection, Residential Properties* (30 September 2004) s. 844-20.C.; City of Vancouver, By-law No. 8417, *A Bylaw Respecting the Collection, Disposal, Transfer and Recycling of Solid Waste* (13 December 2001) at s.3.2; City of Montréal, Revised By-law c. S-0.1.1, *By-law Concerning Collection Services* (9 July 1999), at s.27; City of Edmonton, By-law No. 13777, *Waste Management Bylaw* (3 December 2007), at s.45; City of Ottawa, By-law No. 2006-300, *Solid Waste Management* (23 August 2006), at ss.64, 67(1), 68; City of Winnipeg, By-law No. 1340/76, *The Solid Waste By-Law* (21 July 1976), at s. 13(a), (b); City of Halifax, By-law No. S-600, *Halifax Regional Municipal “Solid Waste Resource Collection and Disposal By-law”* (19 January 1999), at s.16.1; City of Saint John’s, By-law No. 985, *Sanitation Regulations: Regulations Relating to the Collection and Disposal of Garbage and Refuse* (23 April 1986), at s. 18(1); City of Regina, By-law No. 9935, *The Regina Waste Management Bylaw* (15 October 2007), at s. 2.(5); City of Hamilton, By-law No. 05-190, *Solid Waste Management By-law* (3 December 2006), at s. 6.8; City of Fredericton, By-law No. W-4A, *By-law to Regulate the Collection and Disposal of Garbage and Other Material* (8 March 2004), at 3.06; City of Saint John, By-law No. M2, *A Bylaw for the Storage, Collection and Disposal of Waste in the City of Saint John* (19 December 2005), at s.7.1.

³⁸ City of Calgary, By-law No. 20M2001, *ibid.* at s.4.

³⁹ *A.M.*, *supra* note 20 at para. 35.

the health and safety of our community and the environment, not a mass “relinquishment” of items and information to the state for any and all purposes including criminal investigation and surveillance. “Permitting the police to pick and poke their way through garbage bags to peruse without cause the vestiges of a person's most private affairs would be repugnant.... A free and civilized society should comport itself with more decency.”⁴⁰

37. It would shock the conscience of society and offend community standards of fair play to learn that compliance with municipal waste management requirements confers a license on law enforcement to build, without judicial constraint or supervision, a database populated with our most intimate biological and biographical information.

38. The policy implications of the Crown’s position are profound. The state would be free to harvest waste in “bad neighbourhoods” to build a database of information it would never otherwise be able to gather. No doubt ours would be a society “superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.”⁴¹

ISSUE 2: THE EVIDENCE OUGHT TO BE EXCLUDED UNDER s.24(2)

39. This breach was serious. The police deliberately engaged in a warrantless search of deeply private and intimate information. They engaged in this activity because they did not believe they had a sufficient basis to obtain a warrant. The court ought to distance itself from this activity and the evidence ought to be excluded under s. 24(2).

PARTS IV & V – COSTS SUBMISSIONS AND ORDER SOUGHT

40. The CCLA respectfully requests that this Court allow the appeal and set aside the conviction, and that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2008.

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⁴⁰ *Hempele*, *supra* note 22 at p. 815.

⁴¹ *R. v. Duarte*, [1990] 1 S.C.R. 30 at p. 44.